ALLIANCE BANK MALAYSIA BHD

v.

MEJATI COMMUNICATIONS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[CIVIL SUIT NO: S5-22-718-02]
14 AUGUST 2003

CIVIL PROCEDURE: *Pleadings - Striking out - On ground that pleadings disclose no reasonable cause of action - Bar on evidence - Whether can resort to inherent jurisdiction of court to admit evidence - Why not - Rules of the High Court 1980, O. 18 r. 19(1)(a), (2), O. 92 r. 4*

This was an appeal from the decision of the senior assistant registrar dismissing the 2nd defendant's application to strike out the plaintiff's entire pleadings and endorsement in the writ under O. 18 r. 19(1)(a) Rules of the High Court 1980 ('RHC') or the inherent jurisdiction of the court.

The plaintiff's claim against the 2nd defendant was for the repayment of a loan it had given to the 1st defendant, which loan was secured by a charge over a piece of property of which the 2nd defendant was the registered owner. In applying to strike out the plaintiff's pleadings, the 2nd defendant had sought to refer the court to an annexture to the said charge. (This annexture was an exhibit to an affidavit filed in support of an earlier application by the plaintiff for summary judgment against all the defendants). Through this annexture, the 2nd defendant had wanted to show that the charge was a third-party charge and, therefore, its liability to the plaintiff was only in respect and to the extent of the charged property and nothing more.

Hence, the issue that was central to the instant appeal was whether, considering that the 2nd defendant's application was made under O. 18 r. 19(1)(a) RHC whereby no evidence shall be admissible in view of O. 18 r. 19(2) RHC, the court might yet take cognisance of the annexture to the charge on account of its inherent powers under O. 92 r. 4 RHC.

Held (dismissing the appeal):

[1a] The annexture to the charge could not be considered. The 2nd defendant's application was made under O. 18 r. 19(1)(a) RHC and no evidence was admissible by reason of O. 18 r. 19(2) RHC. The 2nd defendant must confine its references to the pleadings and nothing else. Once an application to strike out is made under O. 18 r. 19(1)(a) RHC, any evidence introduced other than by way of reference to the pleadings cannot be considered. (p 156 b-d)

[1b] It would be unwise, in an application under O. 18 r. 19(1)(a) RHC, to consider any evidence, other than the strict pleadings, by resorting to the inherent jurisdiction of the court under O. 92 r. 4 RHC. To do so would be to override and contradict the specific procedural provisions of O. 18 r. 19(1)(a) and O. 18 r. 19(2) RHC. Order 18 r. 19(1)(a) would then lose its statutory exclusivity. (*Suppuletchimi Karpaya v. Palmco Bina Sdn Bhd* [1994] 2 CLJ 561 HC not followed.) (p 156 f-h)

[2] The plaintiff's pleadings, on their own, disclosed a cause of action against the 2nd defendant. There was, therefore, no justification to strike out the plaintiff's claim. (p 156 d-f)

[2nd defendant's appeal dismissed with costs.]

Case(s) referred to:

Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor [1998] 3 CLJ 253 CA ***(refd)***

Suppuletchimi Karpaya v. Palmco Bina Sdn Bhd [1994] 2 CLJ 561 HC ***(not foll)***

Legislation referred to:

Rules of the High Court 1980, O. 18 rr. 4, 19(1)(a), (2), O. 92 r. 4

For the plaintiff - Steven KP Puung; M/s Isharidah, Ho, Chong & Menon
For the 2nd defendant - Lourdes Abishegam Arrulsamy; M/s Ngeh & Co

Reported by Gan Peng Chiang

JUDGMENT

James Foong J:

Introduction

This is an appeal by the 2nd defendant against the decision of the learned senior assistant registrar who dismissed his application in encl. 7.

Enclosure 7 is an application by the 2nd defendant to strike out the plaintiff's entire pleadings and endorsement in the writ filed against him under O. 18 r. 19(1)(a) of the Rules of High Court (RHC) or "dibawah bidang kuasa sedia ada mahkamah mulia ini".

Adhering to O. 18 r. 19(2) RHC no affidavit was filed in support of this application.

The Test To Be Applied

To consider such application, the test is as follows:

It is firmly established that the power exercised under rule 4 (the precursor to Order 18 r. 19) 'is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is sufficient, even if proved, to entitle the plaintiff to the relief of which he asks for' ... Where the situation arises, the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true, and it is only on that assumption that any suitable case can be made for this application ... The court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses some ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out." – see *Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor* [1998] 3 CLJ 253.

Analysis

In this case the statement of claim against the 2nd defendant alleges that the 2nd defendant being the registered owner of a piece of property had charged it to the plaintiff as security for a loan given to the 1st defendant by the plaintiff. And due to the default in repayment of the loan, the plaintiff gave notice to the defendants to repay. Since the 2nd defendant failed to comply with the notice for repayment this claim against the 2nd defendant is made.

In the statement of defence, the 2nd defendant admits that he had charged the said property to the plaintiff but only as security for the loan granted to the 1st defendant. At no time, the 2nd defendant insists, was he a guarantor. Since the said property is charged to the plaintiff, the plaintiff's claim against him is only in respect of the property and not himself personally.

At the hearing before me, the parties invited me to refer to the annexture to the charge over the said property created by the 2nd defendant in favour of the plaintiff. This document is inserted as an exhibit in an affidavit of the plaintiff under a different application for summary judgment against all the

defendants. The intention of the 2nd defendant in this exercise is to expose to this court that the said charge is a third party charge, thus exempting the 2nd defendant from any liability to the plaintiff other than that concerning the charge property itself. But realizing that this application before me is confined to striking out the plaintiff's claim against the 2nd defendant for failure to disclose a reasonable cause of action under O. 18 r. 19(1)(a) RHC and, where no evidence shall be admissible under O. 18 r. 19(2) RHC, and, of which no affidavit is filed in this application, I have to exclude this document for consideration. My concentration must be restricted to only the pleadings of the case. The affidavit referred to must be excluded for it contains evidence. Otherwise the utilization of this process will be defeated. When the 2nd defendant chose to proceed by this procedure (O.18 r. 19(1)(a) RHC) he must confine his reference to the pleadings and no others. If the affidavit where the relevant exhibit is referred to supports his argument, then other processes in O. 18 r. 19(1) RHC must be used. But once an application is commenced under O. 18 r. 19(1)(a) RHC then, except for the pleadings, all other evidence introduced by whatever means must be denied reference.

Upon examining the pleadings as it stands, I find no justification in striking out the plaintiff's claim. It discloses a cause of action against the 2nd defendant since the 2nd defendant had given a security in the form of charging his land to the plaintiff. As to whether the security will exempt the 2nd defendant from liability to the plaintiff, evidence must be introduced to reveal its nature; and the terms and conditions therein must be scrutinized. Perhaps, when such matters are revealed, then on points of law, the claim against the 2nd defendant may fail. But until then, the claim against the 2nd defendant by the plaintiff must stand since the pleadings itself discloses a cause of action against the 2nd defendant.

Realizing the shortcomings stated above, counsel for the 2nd defendant attempted to influence me with High Court decision of *Suppuletchimi Karpaya v. Palmco Bina Sdn Bhd* [1994] 2 CLJ 561. There the learned judge used the inherent jurisdiction of the court provided by O. 92 r. 4 RHC to refer to certain evidence other than the pleadings to decide on an application filed under O. 18 r. 19(1)(a) RHC. With upmost respect to the learned judge, I am not convinced as to whether such approach is wise. In the first place, this overrides a specific provision (O. 18 r. 19(1)(a) RHC) which is designed to cater for a specific purpose. Secondly, the express provision of O. 18 r. 19(2) RHC, prohibits the use of any evidential materials other than the pleadings for consideration in such application. To go beyond this, may not only contravene an explicit provision of the procedural law but also compel the court to examine other

materials besides the pleadings. Then to what limit and extent this process of examination involves is difficult to determine. If there is such a need to consider other evidential materials besides the pleadings, it is not imperative upon the applicant to proceed under O. 18 r. 19(1)(a) RHC. There are three other processes under O. 18 r. (1) RHC available to an applicant for use to strike out a claim against him with the use of evidential materials other than the pleadings. But when the applicant elects to proceed under O. 18 r. 19(1)(a) RHC, then he must confine himself to the demands and restrictions specified therein. Otherwise, if the court is to come to his aid with O. 92 r. 4 RHC by using other evidential materials, then there will be no exclusivity in an application made under O. 18 r. 19(1)(a) RHC. In addition, one may question the procedural fairness of this approach (using O. 92 r. 4 RHC) when the respondent to an application under O. 18 r. 19(1)(a) RHC only comes prepared to answer a charge on the effects of the pleadings upon the applicant. If other evidential material is allowed to be introduced such respondent may be deprived of an opportunity to adduce other evidential material to counter that used by the applicant.

Conclusion

By reasons aforesaid, I hereby dismiss the 2nd defendant's appeal with cost.